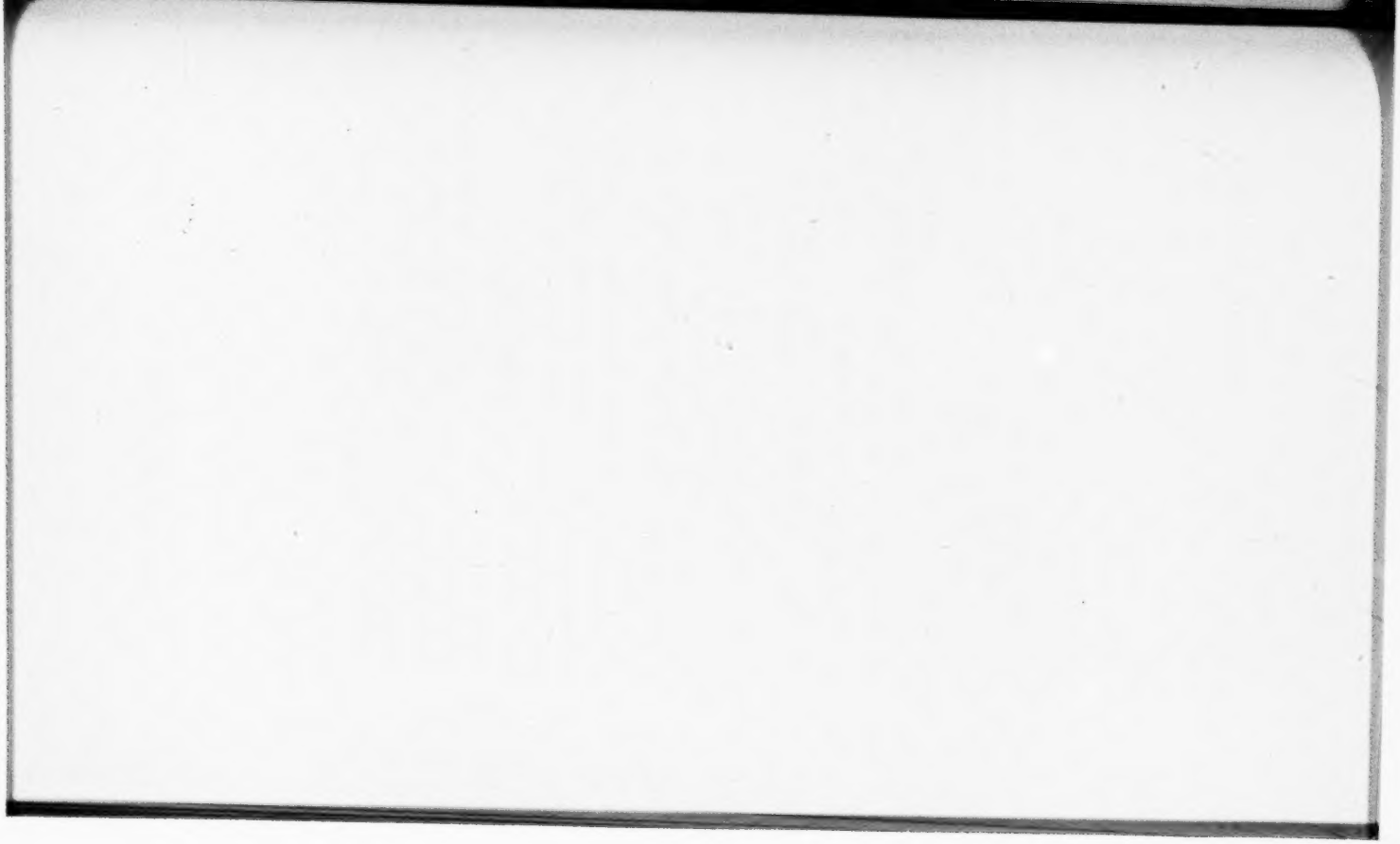

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IN THE

Supreme Court of the United States

October Term, 1944.

No. 1208.

CLARA I. MAYS, *Petitioner,*

v.

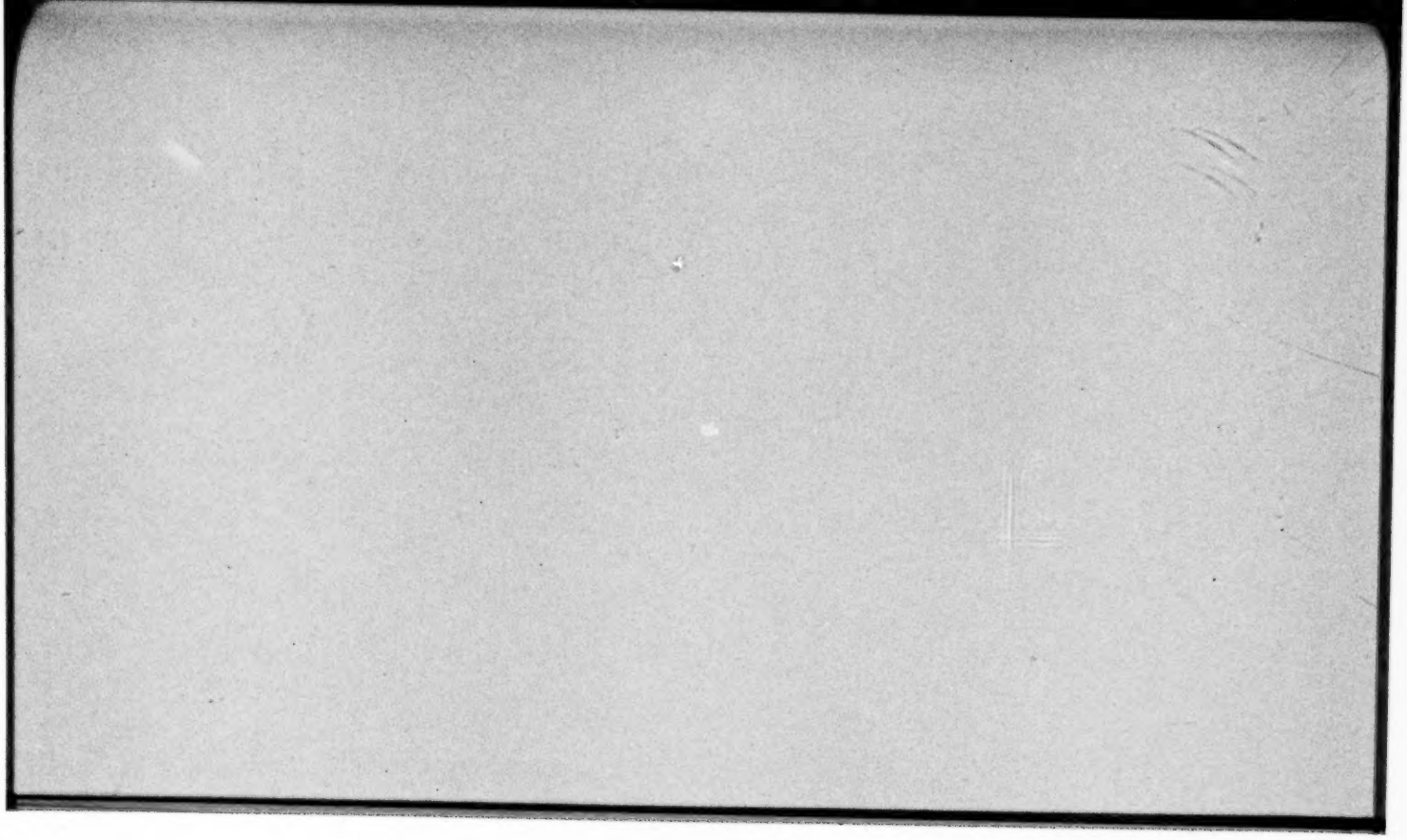
WILLIAM T. BURGESS, *et al., Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

HENRY GILLIGAN,
1021 Washington Loan & Trust Bldg.,
Attorney for the Respondents.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.
CHARLES W. WARDEN, WASHINGTON REPRESENTATIVE,
TOWER BUILDING



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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

Statement of the Case.

Respondents deem a brief statement of the case necessary, because the references to the facts in the Petition are incomplete and somewhat misleading.

Three of the respondents personally executed the Indenture dated September 1, 1925, another testified he and his wife purchased their property in 1931 relying upon the protection afforded by said Indenture (R. 34), another testified she had bought her property "about two years ago" relying upon said Indenture, paying $9,500 for it and spending $1,800 in improvements. (R. 34.) Petitioner paid $9950

for the property in suit. (R. 31.) Eighteen of the thirty-two properties are owner-occupied. (R. 34.) The property is in a community of approximately 1000 homes, churches, places of business and schools, all under either deed covenants or similar restrictive agreements on the Negro question, all occupied by persons of the white race and about 80% owner-Occupied. (R. 33, 34.)

Petitioner, a Negro, purchased 2213 First Street, N. W., with actual as well as constructive knowledge of said Indenture, from Consolidated Properties, Incorporated, through Peter T. Stathes, Secretary Treasurer, who conveyed without consideration to Jane Cook, his sister, a "straw" party, for re-conveyance to the petitioner. (R. 23.)

The District Court, after hearing, found that petitioner was a Negro and enjoined her from holding title to or possession of the premises in violation of said Indenture, *its covenant running with the land and binding the respective parties, their heirs and assigns, for 21 years.* (R. 24, 27.) (Italics supplied.) This Judgment was affirmed by the Court of Appeals. (R. 36.)

I. NO CONSTITUTIONAL OR OTHER FEDERAL QUESTION OF SUBSTANCE IS INVOLVED.

No question of substance relating to the construction or application of the Constitution or statutes of the United States is involved in this case.

In Corrigan v. Buckley, 271 U. S. 323, (55 App. D. C. 30) this Court had before it the *identical covenant* involved in this case. This Court had presented to it at length both the presumed questions of constitutional and statutory construction and the question of general law involved, and dismissed the appeal on the ground that no questions were involved under the Fifth, Thirteenth and Fourteenth Amendments to the Constitution, and that the construction of Sections 1977, 1978 and 1979, Revised Statutes of the United

States, was not drawn in question. No action of any public authority subject to constitutional or statutory prohibitions is in any way involved in this case. This Court there said:

> "It is obvious that none of these Amendments prohibited private individuals from entering into contracts respecting the control and disposition of their own property; and there is no color whatever for the contention that they rendered the indenture void. And, plainly, the claim urged in this Court that they were to be looked to, in connection with the provisions of the Revised Statutes and the decisions of the courts, in determinating the contention, earnestly pressed, that the indenture is void as being 'against public policy,' does not involve a constitutional question within the meaning of the Code provision."

The suggestion made in petitioner's brief (pp. 17 and 23) that there is a question involving the construction of a Federal statute, to wit: section 42, Title 8 of the United States Code (formerly Section 1978 of the Revised Statutes) is entirely without support in the record. This question has not been raised or suggested in the courts below and there is no action of any public authority subject to the terms of the statute in any way depriving petitioner of her right to purchase, sell, and hold real and personal property. The limitation which excluded petitioner, as the Court below held, from holding and occupying a certain piece of property in the District of Columbia was entirely a matter of private contract between adjoining and neighboring land owners.

With reference to a similar contention in Corrigan v. Buckley, *(supra)* this Court said:

> "Assuming that this contention drew in question the 'construction' of these statutes, as distinguished from their 'application,' it is obvious upon their face that while they provide, *inter alia*, that all persons and citizens shall have the equal right with white citizens to make contracts and acquire property, they, like the Constitutional Amendment under whose sanction they were enacted, do not in any manner prohibit or invalidate contracts entered into by private individuals in

> respect to the control and disposition of their own property. There is no color for the contention that they rendered the indenture void; nor was it claimed in this Court that they had, in and of themselves, any such effect."

And, as the Court of Appeals so aptly states in the pending case, (R. 39):

> "In the intervening twenty years (since the Supreme Court's decision in the Corrigan-Buckley case) the question under similar facts has arisen in at least five additional cases;[1] and in the last named of these, the Hundley case, which was decided less than two years ago, we said that, in view of the consistent adjudications by this Court that a covenant against Negro ownership or occupation is valid and enforceable in equity by way of injunction, it must now be conceded to be the settled law in this jurisdiction."

II. NO QUESTION OF LARGE PUBLIC CONCERN IS INVOLVED.

Petitioner apparently contends in her brief that the question of whether this Indenture is void because contrary to the public policy of the District of Columbia is a question of large public concern which has not been, but which should be decided by this Court, under correct principles of equity jurisprudence, and cites: 1. two railroad cases covering the removal of railroad facilities, decided in 1890 and 1903 by this Court, involving alleged analogous considerations; 2. inadequate housing and social conditions; 3. remoteness of parties signing the Indenture; and 4. so-called fundamental national policies expressed in the Constitution and laws of the United States.

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[1] Torrey v. Wolfes, 56 App. D. C. 4, 6 F. (2d) 702
Russell v. Wallace, 58 App. D. C. 357, 30 F. (2d) 981
Certiorari denied: 279 U. S. 871
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Certiorari denied: 302 U. S. 694
Hundley v. Gorewitz, 77 App. D. C. 48, 132 F. (2d) 23.

(a) The Covenant is Not Against the Public Policy of the District of Columbia.

The question of whether this indenture affected a certain piece of real estate located in the District of Columbia and was enforceable by injunction against persons occupying said land in violation of the indenture is one of local law, and the only public policy involved is that of the District of Columbia. A decision on the question cannot have any effect on the law of real property which may be located in other states or jurisdictions. While there is no substantial diversity in the various states, each state court has treated the question as one of the local law of real property, to be governed by its own principles. *There are no conflicting Federal decisions on the question, and it arises in the U. S. Court of Appeals for the District of Columbia only through the local jurisdiction of that court and not as involving any Federal right.* (Italics supplied.) The public policy of the District of Columbia, like that of any state affecting such questions, is that fixed by applicable statutes and declared by the highest court of the jurisdiction. What its public policy is and what does or does not conflict with it, cannot be a question of general importance. See Hartford Fire Ins. Co. v. Chicago, etc. Ry., 175 U. S. 91, 100.

The Court of Appeals of the District of Columbia is the highest court of an important and thickly populated territorial subdivision of the United States. Congress through the Judicial Code, Section 240 (28 U. S. Code Sec. 347 c) has seen fit to make its judgments final and not reviewable by writ of error or appeal, but only by certiorari, thus making its decisions on questions of local law, such as are involved in this case, equivalent to similar decisions of the highest courts of the states.

Respondents respectfully call the Court's attention to the following excerpt from the decision of the Court of Appeals in this case (R. 40):

"Little need now be said on the subject of that (public) policy. The proposition is not new and was unsuccessfully urged in the Corrigan case, *supra*, in this court and in the Supreme Court. And nothing is suggested now that was not considered then. The Constitution is the same now as then, and we are cited to no new public laws, nor indeed to any other course or practice of Government officials, which the *private* action of the original owners of the block in question contravenes. And the public policy of a State of which courts take notice and to which they give effect must be deduced—in the main—from these sources. Surely it may not—properly—be found in our personal views on sociological problems. As to the District of Columbia, we must take judicial notice of the fact that separate schools are established for the white and colored races; separate churches are universal and are approved by both races; and that in the present local housing emergency, large amounts of public and, perhaps also, of private funds have been expended in the establishment of homes for the separate use of white and colored persons. And these accepted practices are not intended to and should not be considered to imply the inferiority of either race to the other."

(b) THE INDENTURE DOES NOT CONSTITUTE AN UNLAWFUL RESTRAINT ON ALIENATION.

Petitioner in her brief seems to have abandoned the contention, urged in the lower courts, that the Indenture (or Restrictive Agreement) constitutes an unlawful restraint on alienation. Respondents therefore merely call attention to the opinion of Mr. Justice Fields in Cowell v. Colorado Springs Co., 100 U. S. 55, 25 L. Ed. 547, sustained in Potter v. Couch, 141 U. S. 296, 315, and cited in all cases on this subject; the restrictive covenant here involved, and similar deed covenants, do not constitute an unlawful or undue restraint on alienation.

III. ACTION IN THE COURTS IS PROPER AND ESSENTIAL FOR LAW-ABIDING CITIZENS TO OBTAIN EQUAL PROTECTION OF THE LAWS.

Petitioner urges that the courts cannot enforce such restrictive agreements, because the Judiciary is a branch of the Government, and cite in support of the proposition the case of Buchanan v. Warley, 245 U. S. 60, a Kentucky case. There appears to be no need to do more than quote the portion of the opinion conceded by petitioner to state the issue, and observe that reliance on this case makes it obvious that appellants have "misconceived the real question here involved":

> "The concrete question here is: May the occupancy, and, necessarily, the purchase and sale of property of which occupancy is an incident, *be inhibited by the State, or by one of its municipalities,* solely because of the color of the proposed occupant of the premises?" (Italics supplied.)

The contention is not new. In 1924 this proposition was urged in the Corrigan-Buckley case, *(Supra)*, and as late as 1942 the appellants in Hundley v. Gorewitz, *(Supra)* made the same contention, and again in the instant case before the Court of Appeals. Although urged strongly in each case, the point was ignored by the Court.

While it may be argued that courts will not recognize or enforce contracts against public policy, in the absence of such objection the courts are the only place where law abiding citizens may obtain equal protection of the laws and save themselves from being deprived of their property without due process of law. This is exactly what the respondents here did when they filed this suit to enforce their contract. We quote from the opinion of the Court of Appeals (R. 39, 40):

> "In the case we have the parties, as they declared, contracted for their mutual benefit and in the interests of the neighborhood not to permit their land to be sold

to, or used by, persons of the Negro race, and made this covenant binding upon their heirs and assigns. The form of the covenant is immaterial and it is not necessary it should run with the land. 'A personal covenant or agreement will be held valid and binding in equity on a purchaser taking the estate with notice. It is not binding upon him merely because he stands as an assignee of the party who makes the agreement, but because he has taken the estate with notice of a valid agreement concerning it which he cannot equitably refuse to perform.' *Bryan v. Grosse*, 155 Cal. 132, 99 P. 499. And likewise in *Codman v. Bradley*, 201 Mass. 561, 87 N. E. 591, it was said:

> 'It is plain from the language of the indenture that the parties intended a restriction upon each of the five lots in favor of the owners of lots 176 and 177, and their heirs and assigns, which should be for the benefit of the lots, whoever might be the owners of them. It is equally plain that equity will enforce such a restriction. It is not important to determine whether the instrument created a legal estate in the five lots, or precisely what legal estate is created, if any. It created a right enforceable in equity against all persons taking with notice of it, actual or constructive, and this equitable right is in the nature of an easement, even if it rests on no broader principle than that equity will enforce a proper contract concerning land, against all persons taking with notice of it. [Citing cases.] In the present case it plainly appears that the intention of the parties was that their respective promises should be for the benefit of the promisees as owners of the neighboring land, and of subsequent owners of these lots. Such a promise may always be enforced in equity by an owner.' "

Petitioner further urges that not only is a restrictive agreement of the kind involved here invalid for the assigned reasons, but that property owners, attempting "in any legitimate way" to secure their property rights, are guilty of conspiracy "to injure, oppress, threaten or intimidate" her. She cites Section 51, Title 18, of the U. S. Code as authority. At most, reference to this criminal statute can only be urged in support of the claim that such restrictive agreements are repugnant to the Constitution and

violative of the statutes enacted to implement constitutional rights. This Court, in Corrigan v. Buckley, *(Supra)*, and the Court of Appeals, in that and all subsequent cases on this subject, have uniformly held that "the statutes, therefore, can afford no more protection than the Constitution itself. If, therefore, there is no infringement of defendant's rights under the Constitution, there can be none under the statutes."

There is no Federal decision in support of petitioner's contentions. Gandolfo v. Hartman, 49 Fed. 181, in the Southern District of California (1892) does not deal with the principles bearing on restrictions upon alienation at all, but relies upon the terms of a treaty between the United States and China, and is contrary to the decision of this Court in Corrigan v. Buckley, *(Supra)*. Nor has any State decision been cited which cannot be differentiated from the case before the Court in this petition.

IV. THE DECISION OF THE COURT BELOW IS CORRECT AND IN ACCORD WITH THE DECISIONS OF THIS COURT.

The decision of the U. S. Court of Appeals for the District of Columbia not only agrees with the settled rule of property in this District, established by many prior decisions, but is in agreement with the settled principles of law applicable which have been recognized from the time of Lord Coke to the present. The decision below agrees exactly with the cases in this Court, above cited, which have dealt with this question. Moreover, three times this Court has denied Certiorari, since its decision in Corrigan v. Buckley, *(Supra)*, when Petitions involving the identical or similar restrictive covenants, have been sought *(Supra)*.

For the foregoing reasons it is respectfully submitted that the petition for certiorari should be denied.

HENRY GILLIGAN,
Attorney for Respondents.